

STATE OF MICHIGAN  
COURT OF APPEALS

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VAUGHN RANDEL WAITE and DENISE  
WAITE,

UNPUBLISHED  
April 26, 2007

Plaintiffs-Appellants,

v

No. 273747  
Kalamazoo Circuit Court  
LC No. 02-000562-NI

CHAD RANDEL WAITE and M & M MOTOR  
MALL, INC.,

Defendants,

and

AMERITECH CORPORATION, INC., d/b/a SBC  
AMERITECH CORPORATION,

Defendant-Appellee.

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Before: Cavanagh, P.J., and Jansen and Borrello, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court order granting defendant Ameritech's motion for summary disposition. We affirm. This appeal is being decided without oral argument. MCR 7.214(E).

Plaintiff Vaughn Waite was injured while riding in a vehicle driven by his son, defendant Chad Waite. The accident occurred on I-94 when Chad swerved to avoid some traffic safety cones in his lane. It was undisputed that the cones were marked with Ameritech's name. It was plaintiffs' theory that the cones had fallen from a passing Ameritech truck and that Ameritech should be found negligent under the doctrine of *res ipsa loquitur*.

In a prior appeal, this Court reversed the trial court's order, finding that "plaintiffs failed to establish that [Ameritech] was in exclusive control of the cones when the cones ended up on I-94[.]" *Waite v Ameritech Corp*, unpublished opinion per curiam of the Court of Appeals, issued February 28, 2006 (Docket No. 257378), slip op at 2. This Court remanded for the trial court to determine whether there existed a triable issue of fact concerning Ameritech's alleged negligence. *Id.*, slip op at 3.

The Waites agreed that there were three or four cones standing upright on the road. Vaughn drew a picture showing the cones in a diamond formation, while Chad drew a picture showing them in a “V” or triangular formation.<sup>1</sup> On remand, the trial court determined that the evidence was insufficient to create a genuine issue of fact regarding causation and dismissed the claim against Ameritech.

The trial court’s ruling on a motion for summary disposition is reviewed de novo. *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. In ruling on such a motion, the trial court must consider not only the pleadings, but also depositions, affidavits, admissions and other documentary evidence, MCR 2.116(G)(5), and must give the benefit of any reasonable doubt to the nonmoving party, being liberal in finding a genuine issue of material fact. Summary disposition is appropriate if the opposing party fails to present documentary evidence establishing the existence of a material factual dispute. *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999).

In a negligence action, the plaintiff has the burden of producing evidence sufficient to make out a prima facie case. See *Snider v Bob Thibodeau Ford, Inc*, 42 Mich App 708, 712; 202 NW2d 727 (1972). To prove negligence, the plaintiff must establish a breach of duty owed by the defendant, and that the breach was a proximate cause of the plaintiff’s injuries. *Skinner v Square D Co*, 445 Mich 153, 162; 516 NW2d 475 (1994). Because the mere occurrence of an accident is not, in and of itself, evidence of negligence, the plaintiff must present some facts that either directly or circumstantially establish negligence. *Whitmore v Sears, Roebuck & Co*, 89 Mich App 3, 9; 279 NW2d 318 (1979). “Where the circumstances are such as to take the case out of the realm of conjecture and bring it within the field of legitimate inference from established facts, the plaintiff makes at least a prima facie case.” *Clark v Kmart Corp*, 242 Mich App 137, 140-141; 617 NW2d 729 (2000), rev’d on other grounds 465 Mich 416 (2001). However, if the “evidence lends equal support to inconsistent conclusions or is equally consistent with contradictory hypotheses, negligence is not established.” *Skinner, supra* at 166-167, quoting 57A Am Jur 2d, Negligence, § 461, p 442.

It is important to bear in mind that a plaintiff cannot satisfy this burden by showing only that the defendant *may* have caused his injuries. Our case law requires more than a mere possibility or a plausible explanation. Rather, a plaintiff establishes that the defendant’s conduct was a cause in fact of his injuries only if he “set[s] forth specific facts that would support a reasonable inference of a logical sequence of cause and effect.” A valid theory of causation, therefore, must be based on facts in evidence. And while “[t]he evidence need not negate all other possible causes,” this Court has consistently required that the evidence “exclude other reasonable hypotheses with a fair amount of certainty.” [*Craig v*

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<sup>1</sup> The trial court properly declined to consider Chad’s subsequent affidavit in which he denied that the cones were standing upright in any particular pattern. *Dykes v William Beaumont Hosp*, 246 Mich App 471, 480-481; 633 NW2d 440 (2001).

*Oakwood Hosp*, 471 Mich 67, 87-88; 684 NW2d 296 (2004) (emphasis in original; citations omitted).]

In this case, the evidence showed that three or four of Ameritech's safety cones were standing together on the freeway in a geometric pattern. Plaintiffs have no evidence that Ameritech's employees were working on the freeway and placed them there. Plaintiffs theorize that the cones must have fallen from one of Ameritech's trucks as it was driving on the freeway. Plaintiffs have shown that there may have been four Ameritech cones on the freeway, that some of Ameritech's trucks carry four safety cones, that the cones are not always stored securely on a truck, and that Ameritech's trucks frequently travel along the freeway where the accident occurred. However, the evidence showed that Ameritech did not have exclusive control over its safety cones and plaintiffs have no evidence placing one of Ameritech's trucks on the freeway on the day of the accident. Moreover, plaintiffs have not shown that any Ameritech truck that *did* pass along I-94 was carrying unsecured cones, and nothing short of speculation would permit a finding to the contrary. Finally, given the laws of physics, it is not plausible to conclude that four cones falling from a moving vehicle would spontaneously come to rest standing together within the confines of a traffic lane in a neat, geometric configuration. Plaintiffs' theory of this case—that the presence of the traffic cones on the freeway was caused by Ameritech's negligence—constitutes little more than guesswork, and the evidence is certainly equally consistent with other, contradictory hypotheses. *Skinner, supra* at 166-167. The trial court did not err in granting Ameritech's motion.

Affirmed.

/s/ Mark J. Cavanagh  
/s/ Kathleen Jansen  
/s/ Stephen L. Borrello